

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
January 2, 2014

v

CHARLES BRADEN PALMER,

Defendant-Appellee.

No. 311495
Wayne Circuit Court
LC No. 12-003781-FH

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

The prosecutor appeals by leave granted the trial court's decision to depart from the sentencing guidelines and sentence defendant Charles Braden Palmer to probation rather than a term of years in prison.¹ Palmer pleaded guilty as a fourth habitual offender, MCL 769.12, to breaking and entering a building with the intent to commit a larceny, MCL 750.110, and malicious destruction of a building less than \$200, MCL 750.380(5). The trial court sentenced Palmer to serve 36 months on probation with the first six months to be served in jail without the possibility of early release, followed by six months in a rehabilitation program with the Salvation Army. Because the trial court failed to state a substantial and compelling reason to depart from the minimum sentencing range, we reverse and remand for resentencing.

The prosecution contends on appeal that the trial court did not identify a substantial and compelling reason to depart from the minimum sentence range calculated under the sentencing guidelines. As such, it was without the authority to sentence Palmer to probation in lieu of prison. This Court reviews the trial court's factual findings in support of departure for clear error. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). However, this Court reviews de novo whether the departure factor is objective and verifiable as a question of law. *Id.* "Finally, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

¹ See *People v Palmer*, unpublished order of the Court of Appeals, entered October 17, 2012 (Docket No. 311495).

Generally, a trial court must impose a minimum sentence that is within the range calculated under the sentencing guidelines. *Id.* The Legislature gave trial courts the discretion to depart from the minimum sentence range, but only if “the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). The Legislature required trial court’s to have a substantial and compelling reason because it did not want trial courts to routinely depart from the guidelines for just any reason. See *People v Daniel*, 462 Mich 1, 10; 609 NW2d 557 (2000). “A substantial and compelling reason is an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *Young*, 276 Mich App at 449-450 (internal citations and quotation marks omitted). Moreover, in order to be objective and verifiable, “a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *Id.* at 450 (citation and quotation marks omitted).

The trial court recognized that Palmer’s struggles with drug abuse had a correlation with his repeated run-ins with the law; given this underlying problem, it felt that Palmer would be better served by a program that would help him remain drug free than by incarceration. To that end, it decided to depart and gave several reasons in support: it noted that Palmer’s father and brother had committed suicide, which it felt likely affected him; it recognized that Palmer had been able to stop abusing drugs for some years, which showed that he had a desire to better himself; it noted that his prior offenses occurred in clusters after a relapse; it determined that Palmer was not too old to be rehabilitated; it also recognized his remorse and generally felt that Palmer was a good candidate for rehabilitation. Although the trial court’s goal in granting the departure was laudable, we must conclude that it did not comply with the limitations that the Legislature imposed on its discretion to depart.

We first note that the trial court could not rely on Palmer’s remorse or his abstract potential for rehabilitation. As our Supreme Court has specifically held, a defendant’s remorse is a subjective factor that cannot serve as a basis for departure. *Daniel*, 462 Mich at 8. Similarly, while there are objective and verifiable factors that may indicate that a defendant has rehabilitative potential, see *Daniel*, 462 Mich at 7 n 8, one’s belief in that potential is not external to the mind or capable of being confirmed. *Young*, 276 Mich App at 450. Thus, merely asserting that a defendant has rehabilitative potential is not sufficient to warrant a departure. *Babcock*, 469 Mich at 270. The only factors that the trial court gave for departing that were objective and verifiable were: Palmer’s age (51), the fact that his father and brother had committed suicide, his record, and his apparent sobriety for a period of years.

With regard to his age, the trial court provided no analysis connecting Palmer’s age with his rehabilitative potential except to say that he was not so old that he could not be rehabilitated. The “simple iteration of objective and verifiable factors alone is insufficient to meet the statutory standard: the sentencing court must also specifically articulate the reasons why the factors it identifies and relies upon collectively provide ‘substantial and compelling’ reasons to except the case from the legislatively mandated sentencing regime.” *People v Johnson*, 223 Mich App 170, 173; 566 NW2d 28 (1997). In any event, the fact that a 51-year-old man is not so old that he *cannot* be rehabilitated is not the same as stating that he has *greater* potential for rehabilitation that would warrant a downward departure.

The trial court's concern that the sentencing guidelines did not take into account the *probable* effect that his father and brother's suicides had on Palmer was similarly deficient; the trial court again failed to connect the fact that these suicides occurred with Palmer's rehabilitative potential or some other factor that might justify a departure. *Id.* at 173. Although the fact that they committed suicide many years ago was objective and verifiable, the trial court's speculation that the suicides must have affected Palmer was not objective and verifiable. *Young*, 276 Mich App at 450. Consequently, the trial court erred when it relied on this factor.

The trial court also erred to the extent that it thought his prior record did not warrant a harsh sentence. Because Palmer's prior record was considered in the calculation of his sentencing range, the trial court could not rely on his prior record without first finding that the sentencing guidelines gave disproportionate weight to it. *Young*, 276 Mich App at 453-456. Here, the trial court did not analyze the effect that Palmer's prior convictions had on the calculation of his sentencing range and did not find that the effect on his range was disproportionate to the actual circumstances of his criminal history. Therefore, it could not properly rely on that factor. *Id.*

Finally, we agree that Palmer's ability to remain sober for a period of years is an objective and verifiable factor. We also agree that when his sobriety is considered in light of his criminal history, this factor suggests that Palmer's future success may hinge on his ability to obtain treatment for his addiction. However, the trial court did not explain how this factor warranted the specific departure that it chose. It did not, for example, explain whether and to what extent Palmer's addiction issues might be addressed in the prison environment or whether he might be better served through treatment outside prison. It also did not address society's need to be protected from Palmer when he is not sober and how that need related to Palmer's need for treatment outside the prison environment. Consequently, on this record, we conclude that the trial court failed to articulate how this factor warranted a departure from the mandatory minimum sentence range. *Johnson*, 223 Mich App at 173.

Even if the trial court had fully and properly analyzed this factor, it is clear that the trial court improperly relied on factors that were not substantial and compelling. Because we are unable to determine whether the trial court would depart to the same degree, we must remand for resentencing consistent with the sentencing guidelines or rearticulation of the reasons justifying the specific departure. *Babcock*, 469 Mich at 271.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh